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No. 85-1513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EDWIN W. EDWARDS, in his official capacity as Governor of Louisiana, WILLIAM W. GUSTE, JR., in his official capacity as Attorney General of Louisiana, LOUISIANA DEPARTMENT OF EDUCATION, THOMAS G. CLAUSEN, in his official capacity as Superintendent of Education of Louisiana,

Appellants,

—v.—

DON AGUILLARD, LOUISIANA BOARD OF ELEMENTARY AND SECONDARY EDUCATION, ORLEANS PARISH SCHOOL BOARD, *et. al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NEW YORK COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

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No. 85-1513

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

EDWIN W. EDWARDS, in his official capacity as Governor of Louisiana, WILLIAM W. GUSTE, JR., in his official capacity as Attorney General of Louisiana, LOUISIANA DEPARTMENT OF EDUCATION, THOMAS G. CLAUSEN, in his official capacity as Superintendent of Education of Louisiana,

Appellants,

v.

DON AGUILLARD, LOUISIANA BOARD OF ELEMENTARY AND SECONDARY EDUCATION, ORLEANS PARISH SCHOOL BOARD, et al.,

Appellees.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF NEW YORK COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

INTEREST OF THE AMICUS

The New York Committee for Public Education and Religious Liberty (PEARL), founded in 1966, is an association of organizations and individuals committed to the preservation of the dual principle of the separation of church and state and the free exercise of religion as they relate to education in the State of New York. To effectuate its purpose it has instituted suits, submitted briefs amicus curiae, testified before federal and state legislative bodies and engaged in general educational

programs for the community.

Because PEARL and its constituents deem acceptability of "creation science" as a subject for instruction in the public schools to be a serious threat to the integrity of education in the public schools and to the principle of the separation of church and state, it respectfully submits this brief amicus curiae with the consent of both parties.

QUESTIONS TO WHICH THIS BRIEF IS ADDRESSED

This brief is addressed to two questions: (1) did the District Court err in determining on a motion for summary judgment whether or not the statute enacted by the State of Louisiana under

the title Balanced Treatment For Creation-Science and Evolution-Science Act. (La. Rev. Stat. Sec. 286.1 Et. Seq.) [1] violated the First Amendment's ban on laws respecting an establishment of religion; and (2) if it did not, did the statute violate that Amendment?

SUMMARY OF ARGUMENT

(1). The decision of the District Court, affirmed by the Court of Appeals, (and by the Court of Appeals en banc) that it was appropriate to determine the constitutional issue raised in this case on a motion for summary judgment is supported by substantial authority.

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1. The full text of the Act is set forth in Appendix A of this brief.

(2). The challenged statute violates the First Amendment under the "no-aid" test which was first set forth in Everson v Board of Education,[2] and continues to be applied. The statute also violates the Amendment under the purpose-effect test first expressed in McGowan v Maryland,[3] and extended into purpose-effect-entanglement in Walz v Tax Commission,[4] and Lemon v Kurtzman,[5] which continues to be applied by the Supreme Court.

2. 330 U.S. 1 (1947).
3. 366 U.S. 420 (1961).
4. 397 U.S. 664 (1970).
5. 403 U.S. 602 (1971).

I. DETERMINATION BY SUMMARY JUDGMENT IS VALID

There are, we suggest, ample precedents to support the District Court's authority to determine on a motion for summary judgment that the challenged statute violates the Establishment Clause of the First Amendment. The statute (a copy whereof is attached hereto as Appendix A) provides, in short, that whenever educational authorities decide that "evolution-science" shall be taught in a public elementary or secondary school they shall give balanced treatment to "creation-science" and vice versa. The authorities, however, may elect that neither subject shall be offered.

There is no controversy between

the parties in respect to any factual issue that requires determination by trial. The evidence relating to the proceedings in the legislature's enactment of the measure, and the published opinions of expert scientists and clergymen supporting the claim that "creation-science" is truly a science are noticeable and sufficient to justify summary judgment.

No trial is needed to inform a court of the findings, views or opinions of recognized scholars in the sciences or the arts as they are expressed in published books and periodicals and in the affidavits and deposition transcripts presented to the District Court. There is ample authority to support this, going at least as far back as the 1905 case of

Lochner v New York. [6] There Supreme Court Justice Harlan in his dissent said:

> "We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples, and by those having special knowledge of the loss of health." [7]

As an example he quoted from Professor Hirt's "Diseases of the Workers."

Three years later, in the case of Muller v Oregon, [8] this time in a unanimous opinion upholding the constitutionality of a statute setting maximum hours for women working in factories, the Court again relied upon the views of experts. "It may not be

6. 198 U.S. 45 (1905).
7. Id. at 71.
8. 208 U.S. 412 (1908).

amiss," the Court said, "in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources." 9/

In the present case the Court could have deemed the experts' views as expressed in scholarly writings to be persuasive as in Muller or rejected them as unpersuasive as in Lochner. In either

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9. Id. at 419 (emphasis added). Many other instances can be cited. Thus, in Robinson v State of California, 370 U.S. 660, 667 n. 9 (1969), the Court on its own cited six published articles by recognized scientists, not previously referred to by any party, to support the determination that not "only may addiction innocently result from the use of medically prescribed narcotics, but a person may even be a narcotic addict from the moment of his birth.

case a trial was not necessary for the District Court to exercise its option in acting upon the plaintiffs' motion for summary judgment.

In Earley v DiCenso, [10] a companion case to Lemon v Kurtzman, there had been a full factual trial in which the trial court ruled violative of the Establishment Clause a Rhode Island statute providing funds to church-related schools. Lemon was an appeal from a judgment dismissing the complaint for failing to state a claim for relief. In both cases the Supreme Court ruled the challenged statutes unconstitutional; it affirmed the Rhode Island judgment and remanded the Pennsylvania case for

10. 403 U.S. 602 (1971).

further proceedings consistent with its opinion. 11/

The clear meaning of this is that a trial record was not deemed a necessary prerequisite to a judgment of unconstitutionality.

In Stone v Graham, 12/ the Court, in a per curiam decision, granted certiorari and simultaneously reversed a State court decision upholding the constitutionality of a statute requiring posting of the Ten Commandments upon public school walls. The Court summarily rejected the trial court's determination that the Ten Commandments are not religious.

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11. Id. at 625.
12. 449 U.S. 39 (1980).

In Larson v Valente, [13] the Court affirmed an order granting summary judgment invalidating under the Establishment Clause a statute imposing upon some but not all religious organizations an obligation to register and report annually their receipts, income, and expenditures.

It is true that Epperson v Arkansas, [14] the landmark decision in this arena of constitutional law, was decided after a 2-hour trial, but there was no effort in that case to present scientific or other non-religious expert evidence seeking to support the Biblical account in Genesis relating to the origin of man (or woman). The controversy could

13. 456 U.S. 228 (1982).
14. 393 U.S. 97 (1968).

therefore have been determined by the trial court on a motion for summary judgment had either party elected to use that route.

Finally, in respect to this Point of our brief, we call the Court's attention to its decision in the recent case of Matsushita Electric Industrial Co. v Zenith Radio Corporation. 15/ While the case involved an alleged conspiracy in restraint of trade in violation of the Sherman Act, the principle set forth is a general one affecting summary judgment in all cases.

In that case the Court ruled that on a motion for summary judgment the

15. 106 S. Ct. 1348 (1986).

defending party must establish the presence of a genuine issue of material facts; it is not enough for the defendant to do no more than simply show that there was some "metaphysical doubt as to the material facts." 16/ As we establish in Part II our defendants present what at most is literally a "metaphysical" doubt as to the material facts in the case.

In sum, in respect to the question now before the Court, there is, we submit, ample authority to justify upholding disposition of the controversy upon a motion for summary judgment.

16. Id. at 1356 (emphasis added).

II. VALIDITY OF CREATIONISM ACT UNDER THE ESTABLISHMENT CLAUSE

Measured by the no-aid test announced in Everson v Board of Education, [17] or the purpose-effect test as first set forth in McGowan v Maryland [18] and later expanded to add entanglement in Walz v Tax Commission [19] and Lemon v Kurtzman, [20] the statute challenged herein cannot survive a test of Establishment Clause validity.

A. The No-Aid Test

In the 1947 decision of Everson v Board of Education [21] upholding a

17. 330 U.S. 1 (1947).
18. 366 U.S. 420 (1961).
19. 397 U.S. 664 (1970).
20. 403 U.S. 602 (1971).
21. 330 U.S. 1 (1947).

statute providing tax-raised funds to finance transportation of pupils to church-related schools, the Court for the first time spelled out in full the meaning of the First Amendment's Establishment Clause, and expressed what became known as the "no-aid" test. Basically, it ruled that, subject to some limited exemptions, neither a State nor the Federal Government "can pass laws which aid one religion, aid all religions, or prefer one religion over another." [22]

A year later, in McCollum v Board of Education, [23] a case much like the one now before the Court in that it dealt with aid to religion through public

22. Id. at 15.
23. 333 U.S. 203 (1948).

school practices, the Court used the no-aid test in ruling violative of the Establishment Clause the practice of releasing from classes pupils who wished to participate in religious instruction on the school premises. It was immaterial, the Court held, that participation by the pupils might be entirely voluntary and that the instructors received no compensation from the state.[24] Decisions following McCollum consistently applied the no-aid mandate in affirming or reversing lower court determinations in relevant cases. Treated chronologically the pre-Epperson decisions are Torcaso v Watkins,[25]

24. Id. at 207-08.
25. 367 U.S. 488 (1961).

School District of Abington Township v Schempp,[26] and De Kalb (Illinois) School District v DeSpain.[27]

Thus, in Torcaso, a suit by an atheist, the Court ruled violative of the no-aid clause a state constitutional provision that required applicants for public office to take an oath that they believed in the existence of God. Most significantly the Court noted in its opinion that:

> "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."[28]

In School District of Abington

26. 374 U.S. 203 (1963).
27. 390 U.S. 906 (1968), denying cert., 384 F. 2d 836 (7th Cir. 1967).
28. 367 U.S. 488, 495 n. 11 (1961).

Township v Schempp and its companion case Murray v Curlett [29] the Court, in a single opinion, held violative of the no-aid clause statutes that required daily public school recitation of the Lord's Prayer and participation in devotional Bible reading. It was immaterial, the Court said, that the selected prayer might be acceptable to Protestants, Catholics and Jews, and that the Bible reading could be from the Protestant, Catholic or Jewish versions and that the pupils were allowed to elect non-participation in the services. The Establishment Clause barred aid to all God-centered religions through utilization of the state's public

29. 374 U.S. 203 (1963).

education systems whether or not excusal was allowed.

Another relevant case to reach this Court is DeKalb School District v DeSpain. 30/ In that case a kindergarten public school teacher adopted the practice of accompanying the children in what later became known as the "cookie prayer," so called because it was recited before the children's morning snack. Originally, the prayer read as follows:

> We thank you for the flowers so sweet;
> We thank you for the food we eat;
> We thank you for the birds that sing;
> We thank you, God, for everything.

The teacher was no lawyer, but

30. 384 F. 2d 836 (7th Cir. 1967), cert. denied, 390 U.S. 906 (1968).

she must have had some inkling of the Schempp decision, for she sought to secularize the prayer and thus make it constitutionally permissible by making it Godless. After that decision the words of the prayer which she led her pupils in reciting were:

> We thank you for the flowers so sweet;
> We thank you for the food we eat;
> We thank you for the birds that sing;
> We thank you for everything.

The revision may have sacrificed the rhythm of the original and must have left at least some of the children puzzled as to who was the "you" they addressed. But the sacrifice proved futile; the court of appeals held the practice to be unconstitutional and the Supreme Court refused to upset the

decision.

It would seem that the school teacher anticipated the Louisiana legislature by some twenty years in evading use of the word "God," but as we later consider in this brief this Court should not allow such a device to effectively nullify the no-aid prohibition of the First Amendment, any more than it did in DeKalb.

The post Everson cases discussed hereto all antedated Epperson v Arkansas. [31] In that case the Court relied in part upon the First Amendment's Establishment Clause in ruling invalid an Arkansas statute that made it unlawful for a teacher in any state-supported

31. 393 U.S. 97 (1968).

school or university "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals," or "to adopt the use in any such institution a textbook that teaches [this] theory." The Court, in invalidating the statue under the Establishment Clause, quoted verbatim the statement in Everson that "neither [a State nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another." 32/ Although, as is indicated more fully in the next subsection of this brief, the Court relied more fully upon what was then called the purpose-effect principle, it

32. Id. at 106, quoting 330 U.S. 1, 15 (1947).

nevertheless also relied upon the Everson no-aid principle. It is to these later decisions that we call the Court's attention.

B. Purpose-Effect-Entanglement

As noted, beginning with Epperson the Court, in deciding Establishment cases, has relied upon the purpose-effect (later in Walz v Tax Commission, 33/ adding thereto entanglement) more than upon that of no-aid. (In Walz it upheld constitutionality under no-aid as well.) Nevertheless, the continuum is witnessed by the cases already considered and those

33. 397 U.S. 664 (1970).

to which we now call the Court's attention.

Thus, in McGowan v Maryland [34] it ruled that a state does not violate the principles of the Establishment Clause as set forth in Everson when it requires stores to remain closed on Sundays. However, it completed its opinion with the following sentence:

> "...We do not hold that Sunday legislation may not be a violation of the 'Establishment' Clause if it can be demonstrated that its purpose - evidenced either on the face of the legislation, in conjunction with its legislative history or in its operative effect - is to use the State's coercive power to aid religion." [35]

This association of no-aid with purpose-effect under the Establishment

34. 366 U.S. 420 (1961).
35. Id. at 453.

Clause was echoed in School District of Abington Township v Schempp.[36] There the Court, after quoting the no-aid principle as set forth in Everson said:

> "[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."[37]

To support this ruling, the opinion cites Everson and McGowan.

It should be noted that the addition of "inhibition" is consistent with what is conventionally called the "no-aid" principle but more accurately should be called the "no aid or inhibition" principle. In Everson the Court said:

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36. 374 U.S. 203 (1963).
37. Id. at 453).

> "Neither [a State nor the Federal Government] can force nor influence one to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church-attendance or non-attendance." 38/

Two years after Epperson, the Court, in Walz v Tax Commission, 39/ for the first time added a third requisite in determining Establishment constitutionality - that of entanglement. The following year, in Lemon v Kurtzman and the companion case of Earley v DiCenso 40/ it set forth in a single opinion the purpose-effect-entanglement test on which to adjudge

38. 330 U.S. 1, 15-16 (1947) (emphasis added).
39. 397 U.S. 664 (1970).
40. 403 U.S. 602 (1971).

constitutionality under the Establishment Clause. It said:

> "...First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" 41/

With one exception, Marsh v Chambers, 42/ the Court has consistently resorted to this test in litigation involving the inter-action of religion and state. In that case it rejected a challenge to the use of tax-raised funds to finance employment of legislative chaplains, basing its decision on the historic fact that for almost two centuries opening legislative sessions

41. Id. at 612-13 (citations omitted).
42. 463 U.S. 783 (1983).

with prayers was a universal practice in Congress and among the states.

The Marsh decision is obviously distinguishable from the one now before the Court. There is no such historical basis for religious instruction in the public schools. On the contrary, the origin of the public school system in the United States resulted in large measure from the felt need for a secular school system, one devoid of religious instructions. Justice Frankfurter in his concurring opinion in McCollum, noted that "by 1875 the separation of public education from Church entanglements, of the State from the teaching of religion was firmly established in the consciousness of the nation." 43/

43. 333 U.S. 203, 217 (1948).

For the following specific reasons we submit that the Louisiana statute challenged in the present case fails under each of the three-part purpose-effect-entanglement test of unconstitutionality.

1. Purpose

The Louisiana statute is entitled "Balanced Treatment for Creation-Science and Evolution-Science Act." Immediately after setting forth this title, it states: "This Subpart is enacted for the purposes (sic) of protecting academic freedom." No other purpose is presented, but it is difficult to avoid the conclusion that what the legislature sought to do was to meet pro

forma the "purpose" requisite in the purpose-effect-entanglement test of constitutionality. Certainly academic freedom is not protected by compelling faculties to teach a course they do not want to teach or forbidding them to teach one that they do. While the courts must accord great weight to the legislature's statement of purpose, such a statement cannot serve as a talisman which can convert the invalid into the valid.

Were it otherwise every legislature could nullify the "purpose" requirement by simply including the magic sentence. Certainly, this case would present a remarkable and unprecedented role drama reversal in which noble legislators strive to promote academic freedom against such villainous

adversaries as the Louisiana Science Teachers Association, the National Association of Biology Teachers, the National Science Supervisors Association, the National Science Teachers Association, the University of New Orleans Federation of Teachers, and the National Coalition for Public Education and Religious Liberty whose membership includes the National Education Association, all of whom are co-plaintiffs in this lawsuit.

It does not help that the word "God" is carefully kept out of the statute; nor that the first letter in "creation-science" is not capitalized. The entity to whom the "creation" is attributed can hardly be any other than the Deity popularly called God.

Even before the First Amendment was adopted, the framers of the Constitution made a deliberate decision not to invoke the Creator or any other synonym for God in the Constitution. This sharp contrast with the short Declaration of Independence which invoked the Deity (as "God," "Creator," "Supreme Judge of the World," and "divine Providence"), is manifested in the last sentence of the Constitution (Article VI Paragraph 3) which declares that "no religious test shall ever be required as a qualification to any office or public trust under the United States." In Torcaso v Watkins,[44] although the Court did not find it necessary to

44. 367 U.S. 488 (1961).

adjudge whether the Article VI ban is applicable to the states, it held that the same prohibiion applies to the states under the Establishment Clause. In particular, the Court invalidated a Maryland provision requiring all officials to take an oath of belief in the existence of God.

This factor is supported by the Court's decision in Stone v Graham. [45] There the Court invalidated under the Establishment Clause a Kentucky statute that required the posting of a copy of the Ten Commandments on the wall of each public school classroom in the State. In an effort to evade invalidation under that Clause the statute provided that the

45. 449 U.S. 39 (1980).

Ten Commandments plaque was to be purchased with private contributions, and that

> "...[i]n small print below the last commandment shall appear a notation concerning the display, as follows: 'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'" 46/

The Court ruled futile this effort at evasion. It held that "the pre-eminent purpose" for posting the Commandments was plainly religious in nature.

Appellants, on page 32 of their brief, seek to distinguish Stone v Graham in that it involves "requiring religious activities in public schools." The difficulty with this distinction is that

46. Id. at 39 n. 1.

it just is not so. On the contrary, the legislators in Kentucky sought to evade nullification under the Establishment Clause by exactly the same means as did the legislators in the present case, and the ultimate result was this Court's determination of unconstitutionality. Indeed, if there are any differences between the two cases, it would seem that the Kentucky statute was less vulnerable to nullification than the Louisiana statute here in issue. We indicate this in the chart in Appendix B.

The Epperson decision too was based upon impermissible purpose. After noting the purpose and primary-effect prohibition set forth in Schempp, the Court said:

"In the present case, there can

be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law's reason for existence. Its antecedent, Tennessee's 'monkey law,' candidly stated its purpose: to make it unlawful 'to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.' Perhaps the sensational publicity attendant upon the Scopes trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to 'the story of the Divine Creation of man' as taught in the Bible, but there is no doubt that the motivation, [i.e., purpose] for the law was the same: to suppress the teaching of a theory which, it was thought, denied the divine creation of man." 47/

47. 393 U.S. 97, 107-09 (1968) (emphasis added, footnotes omitted.)

The only difference between the Arkansas statute and the one challenged in the present case is that the former sought to forbid outright the teaching of evolution while the latter offers the alternative of teaching also "the story of the Divine Creation of man" or the "divine creation of man." (The Court in Epperson obviously saw no difference between the capitalized and uncapitalized spelling; it used both in the last sentence of its opinion.) Moreover, that the option of teaching or not teaching is promulgated not by educational but by legislative authorities, testifies to the reality that the purpose of the statute is to advance religion. It is not usual that a legislature should mandate that schools must teach either both Plato and

Aristotle or neither; both Shakespeare and Milton or neither; both Bach and Beethoven or neither.

A supplement to DeKalb School District v DeSpain,[48] discussed earlier in this brief, can be found in the case of Wallace v Jaffree.[49] There a public school teacher in Alabama, apparently unaware of the DeKalb decision, led her pupils in the following prayer:

> "God is great, God is good,
> "Let us thank Him for our food."

The United States Court of Appeals ruled the practice violated the Establishment Clause[50] and the Supreme

48. 384 F. 2d 836 (7th Cir. 1967), cert. denied, 390 U.S. 906 (1968).
49. 466 U.S. 924 (1984).
50. 705 F. 2d 1526 (11th Cir. 1983).

Court summarily affirmed the ruling. 51/ The Court also held that the part of the statute authorizing a daily period for meditation or voluntary silent prayer likewise violated the purpose mandate of the Establishment Clause. 52/

Appellants seek to avoid invalidation under the purpose ban by urging that "the concept of a creator is not a necessary part of teaching creation-science and is not essential to creation-science in any event, because the empirical evidence that constitutes creation-science indicates occurrence of creation but not the sources or cause of those occurrences." 53/

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51. 466 U.S. 924 (1984).
52. 105 S. Ct. 2479 (1985).
53. Appellants' Jurisdictional Statement at 8).

It is difficult to comprehend the concept of creation without a creator. Generally, one assumes that where there is an oration there is an orator, where there is litigation there are litigators, when there are conspiracies there are conspirators. When Thomas Jefferson wrote and fifty-five co-conspirators signed the Declaration of Independence they would have been astounded to learn that when speaking of "their Creator" or "Nature's God" or "The Supreme Judge of the world" or "Divine Providence" they had something in mind different from the uncapitalized creator of the Louisiana statute challenged in the present case. Jefferson, after all, was a scholarly and careful lawyer, and it would be rather

surprising that he did not insert at least a footnote to the effect that he did not mean the Divinity but some expert in creationism.

It should be noted too that almost a century ago the Supreme Court, in the case of Davis v. Beason,[54] sought to define the word "religion" in the First Amendment. "The term 'religion,'" it said, "has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." There is no caveat here, even by footnote, to the effect that by "Creator"

54. 133 U.S. 333, 342 (1890) (emphasis added.) The case involved the applicability of anti-bigamy laws to Mormons.

we do not mean "creator."

We submit that the purpose of the statute challenged in the present suit is not to protect academic freedom as the Legislature claims, but rather to suppress the teaching of evolution in schools that choose not to teach the equivalent of Genesis. Students who plan to take college entrance examinations in States in which the examiners expect some knowledge of evolution will be victims of the anti-evolution crusade.

2. Effect

The second of the three-pronged test of validity under the Establishment Clause requires that the challenged statute have a principal or primary

effect "that neither advances nor inhibits religion." 55/ One would assume that what advances necessarily does not inhibit and vice versa, but, as will be indicated shortly, the Louisiana legislature seems to have achieved in one statute both the advancement and the inhibition of religion. It can only be that to evade invalidation for impermissibility of purpose or effect, the draftsmen avoided use of the word "God". But, we suggest, to adjudge Establishment validity without considering the religion issue would be like playing Hamlet without the Dane.

That the statute would have the effect of advancing religion is obvious

55. Lemon v Kurtzman, 403 U.S. 602, 612 (1971).

in respect to schools electing to teach both evolution and creation. A statute that requires or authorizes teaching creationism has the effect of advancing the religion of those to whom Genesis, literally translated, is God's word. This is true from as long ago as the 17th century when the book used for younger children in many colonies was the New England Primer, which taught the alphabet with letters and pictures starting with

> In Adam's Fall
> We Sinned All. [56]

McCollum, decided before the purpose-effect concept became part of our law, and Epperson decided after it did, were predicated upon the premise that

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56. See L. Pfeffer, Church, State and Freedom 325 (Rev. Ed. 1967).

teaching Genesis as a historic fact violated the ban upon aid to or advancement of religion. To evade this ban as far as could be done, the Louisiana legislature enacted the statute challenged herein. Should it be upheld, it can hardly be doubted that the effect would be the advancement of fundamentalist or evangelical religion.

But that is not all: it would also have the effect of inhibiting religion. This is made clear by noting who are some of the plaintiffs in the present suit. Eight are clergymen, Protestant, Catholic and Jewish, as well as the Rabbinical Council of New Orleans, whose constituents are, of course, all clergymen. Among the constitutents of co-plaintiff National Coalition for

Public Education and Religious Liberty is the Board of Church and Society of the United Methodist Church. Indeed, the president of the organization is a Bishop (James K. Matthews). Their presence in this suit can only be interpreted as their recognition that the challenged statute, if upheld, would have the effect of inhibiting the religion of those who do not accept a literal interpretation of creation as related in Genesis.

Appellants present official legislative history that specifically and repeatedly affirms that "creation-science" is scientific and not religious. But the legislators did not write on a tabula rasa; they could hardly have been unaware of the reality that for more than three thousand years untold millions of

Jews, Christians and Moslems have believed and taught that the Creation and the Flood in Noah's time as related in the Bible, were actual historic events.

Irrespective of purpose, Louisiana's statute also violates the effect ban of the Establishment Clause. Should a school opt to teach both "evolution-science" and "creation-science" it would fortify the religion of believing-students and influence the non-believers to adopt creationism as their own belief. It would advance their religious beliefs, since to most elementary school pupils creationism would not be taught in the schools were it not true. That evolution would also be taught would not lessen the constitutional violation. To most pupils

in the lower grades the ritualistic recitation that creationism is a theory would probably be meaningless. In respect to those pupils who do understand what the teachers are saying, teaching creationism as being only a theory would violate the Amendment's ban on inhibiting religion. To teach pupils that the account of Moses splitting the sea or Jesus walking on it is only a theory could hardly be reconciled with the Amendment's ban on the inhibition of religion. The last thing in the world fundamentalist Christians want is for public schools to teach that God's creation of the world or His relationship to Jesus, or Moses' receipt of the Ten Commandments from Him, are only theories.

It is a fair assumption that it

was to appease the fundamentalists that appellees, on page 30 of their brief, offer as "overwhelming historic evidence" supporting constitutionality, the fact that the "Constitution itself closes with 'in the Year of our Lord.'" We suggest that this assertion borders on the absurd. The reference is not to God but to Jesus Christ and for centuries it was used in dates only to distinguish years before or after year one. [57] Some two centuries before our Constitution was written Unitarians denied the Lordship of Jesus; Michael Servetus was burned at the stake for his challenge to generally

57. "B.C." or "A.D." were also used for that purpose. Webster's Third New International Dictionary pp. 52a and 53a (1981).

accepted Christian Trinitarianism.[58]

What is considerably more pertinent here is the fact that those who wrote our Constitution deliberately and knowingly omitted any reference to "our Lord," from the Preamble to the end of Article Six, an omission that did not go unnoticed.[59]

58. John B. Noss, Man's Religions 677-78 (1944). There are many Jews no less sensitive than the Unitarians in respect to "our Lord" and "B.C." and "A.D." For dates preceding the birth of Jesus they use the term "B.C.E." meaning Before Christian Era. For those after, like the appellees in their brief to this Court, and literally inumerable other instances, including opinions of this Court, they use simply nothing. "1986 A.D." is a rarity.

59. See Pfeffer, "The Deity in American Constitutional History," in Religion and the State, J. Wood, Editor (1985) 119, at 121-22.

3. Entanglement

We submit that for the following reasons the statute challenged herein does not meet the ban on "'an excessive governmental entanglement with religion.'" 60/

We call the Court's attention specifically to Subsection 286.7(B) of the statute. It reads:

> "The governor shall designate seven creation-scientists who shall provide resource services in the development of curriculum guides to any city or parish school board upon request. Each such creation-scientist shall be designated from among the full-time faculty members teaching in any college and university in Louisiana. These creation-scientists shall serve at the pleasure of the governor and without compensation."

60. Lemon v Kurtzman, 403 U.S. 602, 613 (1971).

The phrase that the "governor shall designate seven creation-scientists," indicates that the persons to be selected are themselves to be believers in the faith of "creation-science." Otherwise the framers of the statute would have written "persons who are knowledgable in the field of 'creation-science,'" a term indicative of intent to encompass non-believers, or even as in Torcaso v Watkins, [61] / outright atheists.

Repetition of "creation-scientist" twice more in Section 286.7(B) indicates further that this was not simply a clerical error but that the legislators meant what they wrote. (It

61. 367 U.S. 488 (1961).

smacks close to the term "Christian Scientists," which, even if the initial letters were uncapitalized, clearly refers to a religious body.) So understood, there is little doubt that what we have here is impermissible governmental entanglement with religion.

This conclusion is reinforced by the mandate that the appointees "shall provide resource services in the development of curriculum guides." It is not one that would have been used were there vacancies in the secular fields of mathematics, English literature, or physics. In these cases it would be assumed that the school principal or district director would be more competent than the governor to make the necessary personnel selections.

Other than the provision that the governor designate "creation-scientist[s]. . .from among the full time faculty members teaching in any college and university in Louisiana," the statute imposes no restrictions on his choice of persons to provide resource services in development of curriculum guides relating to "creation-science." The provision that they are to "serve at the pleasure of the Governor and without compensation" indicates an intent to enlist the services of believers, rather than of otherwise competent educators, who expect to be paid for their services. The religious teachers in McCollum, as has been noted, also served without compensation by the state.

It is a reasonable assumption

that the governor's appointees will not come from the voluntary membership of institutions such as those that are co-plaintiffs in the present action. It is far more likely that they will come from the faculties of such fundamentalist institutions as Bob Jones University, 62/ Goldsboro Christian School, 63/ and Christian Echoes National Ministry. 64/ The net result will be violation of the Everson ban on governmental preference of one religion over another, and the Walz/Lemon ban on excessive government entanglement with religion.

62. See Bob Jones University v United States, 461 U.S. 574 (1983).
63. See Goldsboro Christian Schools, Inc. v United States, 461 U.S. 574 (1983).
64. See Christian Echoes National Ministry, Inc. v United States, 470 F. 2d 849 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973).

Section 286.4 of the statute directs that all public schools to "give balanced treatment" to "creation-science" and to "evolution- science" in respect to "classroom lectures taken as a whole for each course," and in respect to "textbook materials taken as a whole for each course [and] in library materials taken as a whole for the sciences and taken as a whole for humanities..."

No constitutional (although serious educational) problems would be raised in respect to a law that required equal course time or equal amounts of textbooks for general science and the humanities courses in public schools. Serious constitutional problems do arise when the legislation demands equal time for "creation-science" and "evolution-

science." Why, for example, would the legislature insist upon equal time for one particular allegedly secular subject ("creation science") but not for all other secular subjects (geometry, for example) were it not their intent to equalize the religious with the secular. Moreover, if Biblical creationism were taught as purely a "secular" course, what approach to the explanation of creation would be mandated: that of fundamentalist Christians, liberal Christians, Catholics for a Free Choice, hassidic Jews, liberal Jews, Ethical Culturists, etc.? Whatever the answer, the result would be governmental intervention in religious disputes, ruled violative of Federal public policy in Watson v Jones, [65]

65. 80 U.S. (13 Wall) 679 (1872).

and of the First Amendment in Presbyterian Church in the United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church. [66]

The Court's decision in Lynch v Donnelly, [67] we submit, is not contrary to the position we urge in this case. There the Court, upholding Pawtucket's practice of financing the erection and maintenance of a creche during the Christmas season, ruled that the city had a secular purpose for its action; had not impermissibly advanced religion; and had not created excessive entanglement between religion and the government.

There are marked distinctions between that case and the one now before

66. 393 U.S. 440 (1969).
67. 104 S. Ct. 1355 (1984).

the Court. We do not have here as in Lynch "one passive symbol on an open street or park for a short period of time." Nor can it be said that, unlike Lynch, there is here "nothing like the comprehensive, discriminatory and continuing state surveillance," or the "enduring entanglement" present in Lemon.[68]

On the contrary, what we will have here will, to a substantial extent, be closed door teaching of Genesis not as "one passive symbol," but as a historic fact, at least when it is done by fundamentalist Christians. It is hardly likely in such cases that the caveat in Section 286.4 that creationism be taught only as a theory will be adhered to.

68. Id. at 1365.

The Court in Lynch also considered the question of political entanglement. There it said:

> "...Apart from this litigation there is no evidence of political friction or divisiveness over the creche in the 40-year history of Pawtucket's Christmas celebration. The District Court stated that the inclusion of the creche for the 40 years has been 'marked by no apparent dissension' and that the display has had a 'calm history.'" 69/

We do not have here an absence of "political friction or divisiveness" nor do we have a "calm history" evidenced by absence of a lawsuit over a period of 40 years fractured by the act of a single litigant. Here we have a suit by parents who are directly affected by the statute, joined by an array of responsible organizations committed to maintaining

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69. Id. at 1365.

the integrity of a state public school system. The plaintiffs here did not wait 40 years before bringing suit; they acted as promptly as possible after the governor signed the measure presented to him by the legislature.

We conclude this brief by suggesting a practicable but constitutional solution to a serious problem of conscience facing the legislatures and courts in respect to the issue raised in the instant case. We submit that the State of Louisiana has means to protect the rights of parents whose religious conscience forbids them to allow their children's participation or even presence while evolution is taught without violating either the Establishment Clause or Free Exercise

mandates of the First Amendment.

In West Virginia State Board of Education v Barnett [70] the Court did not rule that the obviously secular practice of saluting the flag violated the First Amendment; it held only that objecting parents must be allowed to withdraw their children from participation in the program, or even being present when it is conducted. In McCollum v Board of Education [71] it held that religious instruction in the public schools violates the Establishment Clause, but in Zorach v Clauson [72] it upheld the practice of dismissing children whose parents so requested so

70. 319 U.S. 624 (1943).
71. 333 U.S. 203 (1948).
72. 343 U.S. 306 (1952).

that they might participate in such instruction off public school premises. The same practice can be mandated either by the legislature or the courts in respect to the secular teaching of evolution. Parents would have the right to have their children separated in other parts of the school while the teaching took place as in the Barnette case, or, as in Zorach, bus them to churches or church schools where they could receive instruction in the Genesis account of man's creation without violating the Establishment Clause of our Constitution.

CONCLUSION

For the reasons set forth herein the decision of the Court of

Appeals should be affirmed.

Respectfully submitted,

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August, 1986

APPENDIX A. BALANCED TREATMENT FOR CREATION-SCIENCE AND EVOLUTION-SCIENCE ACT, LA. REV. STAT. § 286.1 ET SEQ.

SUB-PART D-2. BALANCED TREATMENT FOR CREATION-SCIENCE AND EVOLUTION-SCIENCE IN PUBLIC SCHOOL INSTRUCTION

§286.1. Short Title

This Subpart shall be known as the "Balanced Treatment for Creation-Science and Evolution-Science Act."

§286.2. Purpose

This Subpart is enacted for the purposes of protecting academic freedom.

§286.3. Definitions.

As used in this Subpart, unless otherwise clearly indicated, these terms have the following meanings:

(1) "Balanced treatment" means providing whatever information and instruction in both creation and evolution models the classroom teacher determines is necessary and appropriate to provide insight into both theories in view of the textbooks and other instructional materials available for use in his classroom.

(2) "Creation-science" means the scientific evidences for creation and inferences from those scientific evidences.

(3) "Evolution-science" means the scientific evidences for evolution and inferences from those scientific evidences.

(4) "Public schools" mean public secondary and elementary schools.

§286.4. Authorization for balanced treatment; requirement for nondiscrimination

A. Commencing with the 1982-1983 school year, public schools within this state shall give balanced treatment to creation-science and to evolution-science. Balanced treatment of these two models shall be given in classroom lectures taken as a whole for each course, in textbook materials taken as a whole for each course, in library materials taken as a whole for the sciences and taken as a whole for the humanities, and in

other educational programs in public schools, to the extent that such lectures, textbooks, library materials, or educational programs deal in any way with the subject of the origin of man, life, the earth, or the universe. When creation or evolution is taught, each shall be taught as a theory, rather than as proven scientific fact.

B. Public schools within this state and their personnel shall not discriminate by reducing a grade of a student or by singling out and publicly criticizing any student who demonstrates a satisfactory understanding of both evolution-science or creation-science and who accepts or rejects either model in whole or part.

C. No teacher in public elementary or secondary school or instructor in any state-supported university in Louisiana, who chooses to be a creation-scientist or to teach scientific data which points to creationism shall, for that reason, be discriminated against in any way by any school board, college board, or administrator.

§286.5. Clarifications.

This Subpart does not require any instruction in the subject of origins but simply permits instruction in both scientific models (of evolution-science and creation-science) if public schools choose to teach either. This Subpart does not require each individual textbook or library book to give balanced treatment to the models of evolution-science and creation-science; it does not require any school books to be discarded. This Subpart does not require each individual classroom lecture in a course to give such balanced treatment but simply permits the lectures as a whole to give balanced treatment; it permits some lectures to present evolution-science and other lectures to present creation-science.

§286.6 Funding of inservice training and materials acquisition

Any public school that elects to present any model of origins shall use existing teacher inservice training funds to prepare teachers of public school courses presenting any model of origins to give balanced treatment to the creation-science

model and the evolution-science model. Existing library acquisition funds shall be used to purchase nonreligious library books as are necessary to give balanced treatment to the creation-science model and the evolution-science model.

§ 286.7. Curriculum Development

A. Each city and parish school board shall develop and provide to each public school classroom teacher in the system a curriculum guide on presentation of creation-science.

B. The governor shall designate seven creation-scientists who shall provide resource services in the development of curriculum guides to any city or parish school board upon request. Each such creation-scientist shall be designated from among the full-time faculty members teaching in any college and university in Louisiana. These creation-scientists shall serve at the pleasure of the governor and without compensation.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Approved by the Governor: July 20, 1981.

APPENDIX B

	Stone v Graham	Edwards v Aguillard
Relief Sought	Permanent Injunction	Same
Procedure	Motion for Summary Judgment	Same
Number of Courts Below	2: Trial and State Supreme courts	3: Federal District Court; Court of Appeals; Court of Appeals *en banc*
Gravamen of Complaint	Violation of Establishment Clause	Same
Specific Violation	Impermissible purpose	Same
How Violated	Use of tax raised funds	Same
Reference to Deity in Statute	None	Same
Rulings of Courts Below	Statute constitutional	Statute unconstitutional